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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

ALAN OMAR ABARCA,

Defendant and Appellant.

B208424

(Los Angeles County  
Super. Ct. No. VA095075)

APPEAL from a judgment of the Superior Court of Los Angeles County.

John A. Torribio, Judge. Affirmed.

Cynthia Barnes, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Stephanie C. Brennan and Kathy S. Pomerantz, Deputy Attorneys General, for Plaintiff and Respondent.

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The trial court denied appellant Alan Omar Abarca's motion to withdraw his negotiated guilty plea and then sentenced appellant to 25 years to life in state prison for first degree murder. With a certificate of probable cause, appellant claims on appeal that he had not made his guilty plea knowingly, intelligently and voluntarily, and, as a result, that the trial court abused its discretion in denying appellant's motion to withdraw his guilty plea. We affirm.

### **FACTUAL AND PROCEDURAL BACKGROUND**

On the afternoon of April 27, 2006, Genaro Ramirez, Jonathan Caloca and Steve Gutierrez were standing outside of the Star Foods store located at 2600 Firestone Boulevard in South Gate. Appellant, wearing a black bandana over his face and clad in a gray Raiders hooded sweatshirt, came around the corner and approached the three men. Appellant said "Fuck Willow," and began firing a handgun. Ramirez, Caloca and Gutierrez took off running, but Gutierrez was fatally hit and collapsed on Firestone Boulevard.

Following the attack, police officers asked Ramirez and Caloca to identify the shooter from some photographs. Later, the two men participated in a lineup. Both Ramirez and Caloca identified appellant, with whom they had gone to high school, as the shooter. But, even though Ramirez identified appellant in court as the shooter, he testified that he selected appellant, who was suspect number five, as the shooter out of the lineup because he overheard Caloca talking about suspect number five during the lineup. Caloca testified that before he picked appellant's picture from the photographs, the police told him that appellant was "the one that probably shot [his] friend."

The Los Angeles County District Attorney charged appellant with first degree murder, with an allegation that he discharged a firearm causing great bodily injury or death within the meaning of Penal Code section 12022.53, subdivision (d). Appellant pled not guilty. The second day of the trial, and after three witnesses had identified appellant as the shooter, appellant signed a felony advisement and waiver form and pled guilty to the murder charge, in exchange for the dismissal of the firearm allegation. The trial court accepted the plea and discharged the jury. Appellant understood that he would

receive a sentence of 25 years to life in state prison as a result of his guilty plea, as opposed to a potential sentence of 50 years to life had the case gone to trial.

Subsequently, appellant filed a motion to withdraw his guilty plea. Appellant testified that he had not read the felony advisement form before putting his initials down and signing his name. Appellant also testified that his defense counsel, Timothy Nilan, coerced him into entering the plea and that appellant signed the plea in reliance upon Nilan's alleged misrepresentations to him.

However, appellant did not raise his concerns with the court when entering into his guilty plea, and Nilan's own testimony contradicts appellant's assertions. The trial court found that "the defendant ha[d] been fully advised of each of his constitutional rights, of the maximum consequences of his plea" and "that there [was] a factual basis for the plea." The trial court denied appellant's motion to set aside the guilty plea and sentenced him, pursuant to the plea agreement, to 25 years to life in state prison.

### **DISCUSSION**

Penal Code Section 1018 allows a defendant to withdraw a guilty plea at any time before judgment if good cause is shown. (*People v. Castaneda* (1995) 37 Cal.App.4th 1612, 1616-1617.) Mistake, ignorance, inadvertence, or "any other factor overreaching defendant's free and clear judgment," such as fraud or duress, demonstrate good cause. (*People v. Superior Court (Giron)* (1974) 11 Cal.3d 793, 797; *People v. Griffin* (1950) 100 Cal.App.2d 546, 548.) A defendant must show good cause by clear and convincing evidence. (*People v. Cruz* (1974) 12 Cal.3d 562, 566; *People v. Nance* (1991) 1 Cal.App.4th 1453, 1456.)

"Guilty pleas resulting from a bargain should not be set aside lightly and finality of proceedings should be encouraged." (*People v. Weaver* (2004) 118 Cal.App.4th 131, 146; *People v. Hunt* (1985) 174 Cal.App.3d 95, 103.) A defendant's mere change of mind (*People v. Huricks* (1995) 32 Cal.App.4th 1201, 1208), or the fact that the defendant may have been reluctant, or was persuaded, to enter the plea is not a manifestation of good cause sufficient to allow a defendant to withdraw a guilty plea.

(*People v. Ravaux* (2006) 142 Cal.App.4th 914, 919; see also *People v. Urfer* (1979) 94 Cal.App.3d 887, 892-893.)

In addition, the trial court's discretion in deciding whether to withdraw a guilty plea will not be disturbed unless there is a clear demonstration of abuse. (*People v. Harvey* (1984) 151 Cal.App.3d 660, 666-667.) The appellate court will not reverse the trial court's decision "if there is substantial evidence or a reasonable inference to be drawn from it which supports the order." (*Id.* at p. 667.) And, where the evidence supports two conflicting inferences, it is the duty of the court to sustain the guilty plea. (*Ibid.*) "Moreover, a reviewing court must adopt the trial court's factual findings if substantial evidence supports them." (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1254.) An abuse of discretion is found in the trial court "if the court exercises discretion in an arbitrary, capricious or patently absurd manner resulting in a manifest miscarriage of justice." (*People v. Shaw* (1998) 64 Cal.App.4th 492, 496.)

Appellant also asserts his detrimental reliance on the alleged misrepresentations of his defense counsel. Ineffective assistance of counsel is established if the defendant shows "that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and that counsel's deficient performance was prejudicial, i.e., that a reasonable probability exists that, but for counsel's failings, the result would have been more favorable to the defendant. [Citations.]" (*In re Resendiz* (2001) 25 Cal.4th 230, 239.) Therefore, the test for prejudice requires a showing by the defendant "that a reasonable probability exists that, but for counsel's incompetence, he would not have pled guilty and would have insisted, instead, on proceeding to trial." (*Id.* at p. 253, citing *Hill v. Lockhart* (1985) 474 U.S. 52, 58-59; see also *In re Alvernaz* (1992) 2 Cal.4th 924, 934.) And, if it would be easier for the court to dismiss an ineffectiveness claim due to insufficient prejudice, the court should do so. (*Strickland v. Washington* (1984) 466 U.S. 668, 697.)

Thus, appellant faces two hurdles in this appeal. First, appellant must satisfy a demanding burden of proof to demonstrate good cause justifying a withdrawal of his guilty plea. Second, appellant must show that the trial court abused its broad

discretionary powers in denying his motion. In this case, appellant fails to clear both hurdles.

Appellant claims that he did not read the felony advisement form before putting down his initials and signing his name, and that his defense counsel improperly coerced him into entering the guilty plea. Appellant also cites his reliance on alleged misrepresentations by his defense attorney in entering the guilty plea. Appellant testified as to the following: that his defense counsel, Nilan, told appellant to take the “deal” because otherwise appellant would lose the case due to “coerced” witnesses; that Nilan would abandon the case if appellant did not sign; that appellant would not be able to appeal, because appeals are “based on if the judge does his job” and since “the judge was granting everything [the defense] [was] asking for,” there would be no appeal; that Nilan said that the district attorney would press charges against appellant’s brother and his brother’s fiancée for conspiracy to commit murder if appellant did not sign; and, finally, that Nilan had told appellant that appellant’s mother favored the guilty plea, information upon which appellant claimed he relied in making his decision to plead guilty.

Nilan’s testimony contradicts appellant’s assertions. Nilan testified as to the following: that he did not pressure or coerce appellant at all; that he simply conveyed the plea offer without making any representations regarding the signing of the felony advisement form; that he did not tell appellant that appellant’s brother and brother’s fiancée would be charged if appellant did not sign, but only that he had formed his own independent opinion of that risk and informed appellant of the possibility; and that although he does not remember exactly what appellant’s mother told him, “whatever [Nilan] told [appellant] is exactly what [appellant’s] mother told [Nilan].” Nilan also testified that when appellant filled out the waiver form, appellant “was interested in what that form said and [appellant] was reading that form.”

Furthermore, appellant failed to raise his concerns with the court when entering into his guilty plea, but instead testified that it was in his best interest to plead guilty. Nor did appellant mention to the court his concern for the criminal liability of his brother and his brother’s fiancée. On the day that appellant pled guilty, he testified that no one made

any threats or promises to coerce him to plead guilty, and that he understood that he was pleading guilty to first degree murder with its attendant sentence of 25 years to life in state prison.

Finally, Gregory Hinkel, the sheriff who investigated the current case, testified that he was unaware of anyone chargeable for the murder of Steve Gutierrez other than appellant. That evidence is contradicted only by appellant's self-serving statements.

Ultimately, the trial court appropriately exercised its discretion in weighing conflicting testimony of the witnesses in determining whether to withdraw the guilty plea. It is "the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.]" (*People v. Jones* (1990) 51 Cal.3d 294, 314.) In this case, the trial court found appellant's plea "just a normal plea," with no reluctance on his part. It is significant that, upon taking appellant's guilty plea, the trial court concluded: "In this matter, the court finds that [appellant] has been fully advised of each of his constitutional rights, of the maximum consequences of his plea, and the court finds that there is a factual basis for the plea. The court finds that [appellant] has knowingly, intelligently, and understandingly waived each of his constitutional rights, freely and voluntarily entered his plea, and based thereon, the court accepts his plea."

Yet, even if appellant's assertions of his defense counsel's alleged misrepresentations were true, appellant failed to demonstrate any prejudice resulting from his reliance upon his defense counsel's allegedly inaccurate statements. Indeed, the trial court observed that the prosecution's offer of a reduced sentence of 25 years to life was actually "a significant benefit," giving appellant "a little bit of hope." Considering the potential sentence of 50 years to life and the strong case against appellant, it was indeed unlikely that appellant would have pled not guilty and thus gone forward with the trial absent his defense attorney's alleged actions.

Therefore, appellant has not demonstrated good cause for withdrawing his guilty plea. Since there is at least "substantial evidence or a reasonable inference" supporting

the trial court's denial, we determine that the trial court did not abuse its discretion in denying appellant's motion to withdraw his guilty plea.

**DISPOSITION**

The judgment is affirmed.

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BOREN, P.J.

We concur:

DOI TODD, J.

CHAVEZ, J.